THE PRACTICAL EFFECTS OF THE BUILDING SAFETY ACT 2022

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Real Estate Alert

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The first provisions of the Building Safety Act 2022 (BSA) came into force on 28 June 2022 and the remainder are expected to be implemented by October 2023. The BSA introduces a new regime governing the design, construction, maintenance, and occupation of buildings and has been classed as the most comprehensive and radical reform to the building industry in the last 50 years. The passing of the BSA is a key step designed to improve building safety in England and Wales. Amongst those most likely to be affected by the BSA are parties who develop and/or owners of higher-risk buildings. Higher-risk buildings (as defined in section 65 of the BSA and the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023) are buildings that are at least 18 meters or seven stories high, and contain two or more residential units (Higher-Risk Buildings).[1] The concept of residential units is widely drawn, so for example, it will include student accommodation.

NEW HIGHER-RISK BUILDINGS: PRE-REQUISITES TO CONSTRUCTION AND OCCUPATION

A series of gateways are established through which safety will have to be demonstrated. These are important for developers since it will be an offence to begin Higher-Risk Building development “at risk” (before building control approval is obtained).

A. Gateway One

In order to pass Gateway One, any application for express planning permission must now include a fire statement. Gateway One is already in force.

B. Gateway Two

A Gateway Two application must be submitted and approved by the Building Safety Regulator (BSR) before building work can commence. Providing the BSR with advance notice, in good time before submission, is therefore encouraged to prevent delays. If the BSR doesn't reach a decision within 12 weeks from the date of submission, the application will be deemed to be refused. This will represent a “hard stop” and building work cannot commence. Gateway Two is expected to come into force between April and October 2023.

C. Gateway Three

The dutyholder must submit a completion certificate application to the BSR and register the building with the BSR. In the application, the dutyholder must confirm that the Golden Thread of information has been passed over to the Accountable Person(s) who will be responsible for the building's occupation. The Golden Thread is a comprehensive source of information about the building. It ensures that everyone involved in the building's safety

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and management has continuous access to key information, which will aid in identifying, assessing and mitigating any building safety risks. If the BSR does not make a decision within 12 weeks from the submission of a completion certificate application, the application will be deemed refused and occupation of the building will not be permitted. Developers should therefore consider the impacts of this hard stop on practical completion and the possible pass down of risk to those involved in the design and construction of a Higher-Risk Building. Gateway Three is expected to come into force between April and October 2023.

OBLIGATIONS TO MANAGE BUILDING SAFETY RISKS

1. The rules relating to Higher-Risk Buildings extend into their occupation phase. New roles of accountable persons (Accountable Persons) and principal accountable persons (Principal Accountable Persons) are created and these persons will be responsible for registering buildings under their control before they can be occupied and have ongoing obligations to manage building safety risks during the occupation phase.
2. An Accountable Person will be responsible for continuously assessing and managing the risks to the safety of people in or about a building arising from the spread of fire or structural failure for the part of the building within its responsibility (Building Safety Risks). Assessments are to be made once the building is occupied; regularly thereafter; at any time when the current assessment becomes invalid; or upon the BSR's direction. Assessments must identify hazards, the likelihood and consequences of those hazards becoming major incidents, and show how the risks of major incidents can be mitigated and the measures necessary for doing so. In order to manage such risks, the Accountable Person must implement the mitigating measures identified, and keep these under continuous review. Successful management of Building Safety Risks can also include undertaking physical works to the building. These duties are expected to be fully enforceable by October 2023.
3. There may be more than one dutyholder for any building. Where there is more than one Accountable Person, the legislation designates the one responsible for structure and exterior of the building, or who has a repairing obligation in relation to the same as the Principal Accountable Person. As such, the Principal Accountable Person, must prepare and submit to the BSR a safety case report, combining each Accountable Person's assessments of their part of the building. Whenever an Accountable Person takes new steps to assess and/or manage Building Safety Risks, the Principal Accountable Person must submit a new safety case report. In addition to this, any Accountable Person has to submit mandatory occurrence reports to the BSR, notifying the BSR of discoveries of fire safety, and structural safety related defects, which pose a significant risk to life. Notification should be immediate, with a follow-up report no later than 10 days after this notification. Again, these duties are expected to be fully enforceable by October 2023.
4. The BSA amends the Landlord and Tenant Act 1985 to imply a new term into leases, obliging landlords (who are Accountable Persons) to uphold their duties in relation to management of Building Safety Risks in occupied Higher-Risk Buildings (meaning these cannot be contracted-out of). However, in return, a covenant will be implied on tenants permitting landlords to recover the management costs associated with upholding such duties via the service charge.

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EXISTING HIGHER-RISK BUILDINGS: REGISTRATION

5. The Principal Accountable Person for an existing, occupied Higher-Risk Building must register the building with the BSR. The registration window is between April 2023 and October 2023 (noting that failure to do so will be a criminal offence).
6. The Principal Accountable Person must also apply for a building assessment certificate for a registered building within 28 days of a request by the BSR. However, unlike completion certificates (above), a building assessment certificate is not a prerequisite to occupation.

OBLIGATIONS TO REMEDIATE EXISTING DEFECTS

Under Part 5 BSA, landlords under the lease of a self-contained building in England which contains at least two dwellings and is at least 11 meters or five storeys high (Relevant Building, or any part of it), or any person who is a party to such lease otherwise than as a landlord or tenant (e.g., management companies), must remediate existing fire safety defects. Landlords and any management companies must remediate both existing cladding and non-cladding related defects. The costs of cladding remediation cannot be recovered via the service charge. However, subject to certain limitations and restrictions as set out in Part 5 and Schedule 8 BSA, landlords can seek to recover the costs of remediating non-cladding related defects in “qualifying leases” via the service charge. A “qualifying lease” is one that was granted for a term of 21 years or more of a single dwelling in a Relevant Building; comes with a liability to pay service charge; and was granted before 14 February 2022. These provisions are already in force.

FURTHER ONGOING RESPONSIBILITIES POST COMPLETION

7. The Accountable Person is responsible for maintaining the 'Golden Thread' of information once the building is occupied. To ensure the information remains up to date and comprehensive, the Accountable Person must continuously collate any information gathered during the assessment, management and reporting of Building Safety Risks into the Golden Thread.
8. Upon its establishment, which is anticipated to be by October 2023, developers must join the new home ombudsman scheme. This is an independent complaints forum designed for new build homebuyers.
9. Developers must also provide new build home warranties to purchasers of new homes lasting for at least 15 years, or else face financial penalties. This requirement is expected to come into force between April and October 2023.

FUNDING HISTORIC BUILDING-SAFETY DEFECTS, COSTS, AND LEVY

10. From 1 April 2022, companies or groups of companies in the United Kingdom, with an annual profit above £25 million, will have to pay an additional 4% residential property developer tax. The calculation of profits charged to residential property developer tax is based on the existing rules for Corporation Tax, with payments being made via the same returns system too.
11. The BSA confers powers on the Secretary of State to impose a new building safety levy in England, designed to contribute towards the cost of historical cladding remediation. The levy will apply to all

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residential developments (irrespective of their height) and is to be paid as part of the building control process. In the latest consultation on building safety levy (which started on 22 November 2022 and will end in February 2023), it is made clear that the regime will not apply in respect of affordable homes, small developments of under 10 units, residential care homes, medical centres, and others. Currently it is also proposed that the levy is to be made in two stages: 60% at the "notice to commence construction" stage and 40% to be due prior to final certification. The basis of the levy rate is proposed to apply either on a "per unit" basis (that is, per dwelling in a development) or a "per square metre" basis. Applications for building control approval will not be granted unless the levy has been paid. The levy is chargeable in respect of Relevant Buildings and is expected to be in place by October 2023.

12. The BSA also introduces Building Industry Schemes, whereby the inability to join a scheme can be used to block developers from carrying out developments in England and from obtaining building control approval. To join a scheme, a developer must be an "eligible person" and satisfy certain "membership conditions". It is anticipated that these conditions may include the remediation of historic defective works or paying for such works to be remedied. The competence/conduct of the developer's supply chain, and the persons connected to the developer, will also factor into membership considerations.

REMEDIATION ORDERS, REMEDIATION CONTRIBUTION ORDERS, AND BUILDING LIABILITY ORDERS

13. Under the BSA, the First Tier Tribunal (FTT) can issue a remediation order against a "landlord" (being a landlord under the lease of a building (or part) who has repair/maintenance obligations), requiring it to remedy defects in a Relevant Building. The order will specify the defects and the timeframe for remediation.

14. Alternatively, the FTT can issue remediation contribution orders against: (a) a "landlord" under a lease of the Relevant Building; (b) a person who was a "landlord" at the "qualifying time"; (c) a "developer" in relation to the Relevant Building; or (d) a person "associated" (as defined in section 121 BSA) with any of (a)–(c). The remediation contribution order will require the specified body corporate or partnership to contribute towards the costs of remediation works to a Relevant Building borne by someone else. For these purposes, a "developer" is a person who undertook or commissioned the construction or conversion of the Relevant Building (or part of it) with a view to granting or disposing of an interest in the building. The sections governing both orders are already in force.

15. Under the BSA, the High Court can issue building liability orders (BLO), transferring the liability of an original corporate body on to an associated corporate entity. BLOs only concern liabilities incurred under section 1 and section 2A Defective Premises Act 1972, section 38 Building Act 1984, or those arising from a "building safety risk". A BLO could therefore place the liability of an original developer onto the developer's "group", where the original developer is unable to meet the liability itself.

FINAL COMMENT

Despite its protracted journey through Parliament, the passing of the BSA is a key step designed to improve building safety in England. However, much remains to be seen and done, as many parts of the BSA will need be

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completed by enactment of secondary legislation. The BSA has been referred to by some commentators as the most comprehensive and radical reform to the building industry in the last 50 years.

FOOTNOTES

[1] Building Safety Act 2022 § 65; Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023.

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